KENG SOON FINANCE BERHAD v. PEGAWAI KANAN KASTAM, JOHORE BAHRU

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid FJJ.) March 7 & May 20, 1981]

[Johore Bahru — Federal Court Criminal Reference No. 1 of 1981]

Criminal Law and Procedure — Charge under Customs Act, 1967 — Whether conveyance used in commission of offence — Presumptions under Act — When court should order forfeiture of goods or conveyance — Customs Act, 1967, ss. 119, 128 & 135 — Courts of Judicature Act, 1964, s. 66(1).

Customs — Inquiry under Customs Act — Whether conveyance used in commission of offence — Presumptions under Act — When court should order forfeiture of goods or conveyance — Customs Act, 1967, ss. 119, 128 & 135.

In this case customs officers had laid an ambush for a motor car. The road was blocked by placing a landrover across the road. The motor car however drove past the barrier, landed in a ditch and was abandoned. Goods were found in the abandoned car but no one came forward to claim the goods. Ownership of the car was claimed by the applicant. A summons was issued requiring the applicant to appear at an inquiry. At the inquiry the President of the Sessions Court found that the goods were dutiable goods and the offence of being concerned in conveying dutiable goods had been committed. He also found that the motor car was used in the commission of the offence and ordered it to be forfeited. The applicant appealed to the High Court but the appeal was dismissed. The applicant thereupon applied for the following questions of law to be referred to the Federal Court:—

(1) Whether the court, when hearing a Summons issued pursuant to section 128(4) of the Customs Act, 1967 can rely on the presumption under section 135(2) of the same Act to determine whether an offence in relation to the conveyance is committed when no prosecution was preferred against any person for any offence under the same Act and when the conveyance could not have been the subject matter of the said Summons.

(2) whether the court could, pursuant to section 128(5) of the Customs Act, 1967, invoke the provisions of section 119 of the same Act and shift the burden of proof on to the defendants as owners of the conveyance to show that customs duties on the goods found in the conveyance but belonging to unknown persons had been paid when the subject matter for inquiry under the said Summons should only have been goods found in the conveyance.

Held: (1) section 135(2) of the Customs Act, 1967, enables the presumption under it to be invoked strictly in cases where there is a prosecution under section 135 or section 139 of the Act. It has no application where the court is hearing a summons under section 128(4) of the Act;

(2) a proceeding under section 128(4) of the Act is to determine whether an offence under the Act has been committed and if it has whether the conveyance, the subject-matter of the claim was used in the commission of the offence;

(3) in proceedings pursuant to section 128(4) of the Act, the President or Magistrate has to satisfy himself that an offence against the Act has been committed and either the goods were the subject matter of the offence or where the claim relates to the conveyance, whether such conveyance was used in the commission of the offence. In such a case the court may invoke any presumption of law provided by the Act as and when it is applicable. Therefore by reason of section 128(5) of the Act, section 119 of the Act shall apply in the determination of the matter pursuant to section 128(4);

(4) if the court is satisfied after considering the whole of the materials before it that an offence against the Act has been committed and that the goods were the subject matter or the vehicle was used in the commission of such offence, then in that event, but not otherwise, it is mandatory for the court to make an order for forfeiture. The question of the shifting of the onus of proof does not arise.

Case referred to:-

(1) *R. v. Ng Hee Weng & Ors.* [1956] M.L.J. 85.

FEDERAL COURT.

P. Cumarasamy for the applicants.

Abu Seman bin Haji Yusop (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): This reference to the Federal Court under section 66(1) of the Courts of Judicature Act, 1964 is for the determination of the following questions of law: —

(1) whether the court, when hearing a summons issued pursuant to section 128(4) of the Customs Act, 1967 can rely on the presumption under section 135(2) of the same Act to determine whether an offence in relation to the conveyance is committed when no prosecution was preferred against any person for any offence under the same Act and when the conveyance could not have been the subject matter of the said summons.

(2) whether the court could, pursuant to section 128(5) of the Customs Act, 1967, invoke the provisions of section 119 of the same Act and shift the burden of proof on to the defendants as owners of the conveyance to show that customs duties on the goods found in the conveyance but belonging to unknown persons had been paid when the subject matter for inquiry under the said summons should only have been goods found in the conveyance.

The facts in so far as they are relevant for the determination of these questions are that on April 11, 1973 three customs officers, acting on information, laid an ambush for motor car No. BAE 1024 at 12th mile Jalan Masai, Johore. On seeing the motor car approaching the road was blocked by placing a landrover across the road, however the motor car drove past, lost control, landed in a ditch and was abandoned. It was found loaded with the following goods (hereafter called 'the goods') —

(1) 7 cartons x 80 packets 'Pak Cheong Tong Hou' Chinese Patent Medicine.

(2) 8 boxes x 1 kati Korean Ginseng.

(3) 8 packages x 5 katies Ginseng.

(4) 41 packages x 1 kati Ginseng.

(5) 16 bolts of textiles measuring 1,002 yards.

No one came forward to claim the goods. Ownership to the motor car was claimed by Messrs. Keng Soon Finance Bhd. Kuala Lumpur.

Pursuant to section 128(4) of the Customs Act, 1967 (Act 235) (hereafter called 'the Act'), summons was issued by the Sessions Court Johore Bahru requiring Messrs. Keng Soon Finance Bhd. to appear before an enquiry to determine the claim. Either inadvertently or acting upon a supposition that it was necessary to state in the summons all the goods seized, the claimant was also notified of the goods found in the motor car where no claim was made within one calendar month from the date of the seizure and

were therefore deemed to be forfeited under section 128(1) of the Act.

At the inquiry the President of the Sessions Court found that the goods were dutiable goods and an offence of being concerned in conveying dutiable goods under section 135(1)(e) was committed. As the motor car was evidently used in the commission of the offence it was therefore ordered to be forfeited. Keng Soon Finance Bhd. appealed to the High Court against the order. It was dismissed.

Two grounds were raised on appeal before Syed Othman J. (as he then was) as follows: —

(1) The learned President erred in law when he found that an offence under section 135(1)(e) of the Customs Act, 1967 had been committed when in fact the summons alleged that an offence under section 135(1)(g) of the Customs Act, 1967 was committed.

(2) In any event the learned President erred in finding that an offence under section 135(1)(e) of the Customs Act, 1967 had been proved when in fact there was no evidence on record of "knowledge" and "intention to defraud the Government".

On the first ground the learned judge had this to say —

"From the provision the presiding officer need only concern himself whether an offence under the Act has been committed and not any particular offence."

At the hearing before us, Mr. P. Cumaraswamy counsel for the applicants submitted that as there was no prosecution under section 135(1)(g) of the Act the presumption under section 135(2) cannot therefore be invoked and as such there is absence of proof of that essential element of knowledge to warrant a finding that there was a commission of an offence and that is so even in respect of the goods. He pointed out that the claim was in respect of the motor car which was not uncustomed property and accordingly that knowledge cannot be imputed to the claimant. The applicants also submitted that section 119 of the Act has no application to the present case.

Before we determine the questions posed before us we must make it clear that these questions are so framed that they are far from being explicit. The points of law referred for our determination do not quite reflect the issues raised in the courts below. There emerged from question (1) a combination of questions — (a) whether the court when hearing a summons issued pursuant to section 128(4) of the Customs Act, 1967 can rely on the presumption under section 135(2) of the Act to determine whether an offence under section 135(1)(e) of the Act is committed where no prosecution was preferred against any person for any offence under the Act; (b) whether the determination, as envisaged by section 128(4), of the commission of an offence relates to the conveyance; and (c) whether the conveyance was the subject matter of the summons.

The answer to question (1)(a) is plainly in the negative. Section 135(2) of the Act enables the presumption to be invoked strictly in cases where there is prosecution under section 135 or 139 of the Act. It has no application to the instant case.

As for question (1)(b), the answer is in the affirmative in so far as it affects the use of the conveyance in the commission of an offence. A proceeding under section 128(4) is to determine whether an offence against the Act has been committed, and, if it has, whether the conveyance, a subject matter of the claim, is used in the commission of such offence. In the light of the foregoing, the answer to question (1)(c) must also be in the affirmative.

It must be noted that in proceedings pursuant to section 128(4) of the Act, the function of the President or the Magistrate, as the case may be, is to examine the matter pertaining to the claim by the owner of the goods seized. In doing so he has to satisfy himself that firstly, an offence against the Act has been committed and secondly, either (a) the goods were the subject matter of the offence, or (b) where the claim relates to the conveyance, such conveyance was used in the commission of the offence. As regards proof it is for the court to consider the whole of the matter including, *inter alia,* the goods found in the conveyance, the nature of such goods, whether dutiable or otherwise, and all the circumstances surrounding the particular case. The court may for purposes of such consideration invoke any presumption of law provided under the Act as and when it is applicable. As for example, by reason of section 128(5) of the Act, section 119 of the Act shall apply in the determination of a matter pursuant to section 128(4). For this reason the answer to the first limb of question (2) on the facts of the particular case is in the affirmative. Section 128(5) provides that —

"(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act."

Section 119 reads as follows:

"119. If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovery of any penalty or penalties under this Act, any dispute arises whether the customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or exported or lawfully landed or loaded, or concerning the place whence such goods were brought or where such goods were loaded, or whether anything is exempt from duty under section 14 then and in every such case the burden of proof thereof shall lie on the defendant in such prosecution."

Sections 119 and 128 of the Act appear in Part XIII of the Act entitled "Provisions as to Trials and Proceedings." Proceedings under section 128(4) are clearly proceedings under that Chapter.

On the question of forfeiture, it seems appropriate to refer to *R.* v. *Ng Hee Weng & Ors.*,[1] where Good J., in delivering the judgment of the court, examined section 123 of the Customs Ordinance, 1952 to determine whether it gives discretion to the court to order forfeiture or the release of the vehicle used in the commission of the offence against the Ordinance which has been seized by an Officer of Customs under section 110 of the Ordinance or whether forfeiture is mandatory if it is proved to the satisfaction of the court that the vehicle was so used.

Sections 123(1), 110(1) and 124(4) of the Ordinance have been replaced by sections 127(1), 114(1) and 128(4) of the Act respectively.

In that case it was held that

"where a vehicle used in the commission of an offence had been seized by a Customs Officer under section 110 of the Customs Ordinance 1952 and if it is proved to the satisfaction of the court that the vehicle had been so used, section 123 of the said Ordinance gave no discretion to the court, but render an order for forfeiture mandatory."

In the course of the judgment, Good J. also considered the question whether "goods" includes a vehicle used for the carriage of goods in the commission of the offence against the Ordinance. He referred to section 2(1) of the Ordinance which defines "goods" (similarly defined under section 2(1) of the Act) to include "animals, birds, fish, plants and all kinds of movable property;" and went on to say that "goods" in the context of section 123 clearly does not exclude receptacles, packages, conveyances, vessels and aircraft. In the determination of the questions before us we have to consider whether "goods" in the context of section 128(4) excludes receptacles, packages, conveyances, etc. We think not. The law is clear in that "goods" referred to in that section refers to goods seized pursuant to section 114 of the Act and which evidently includes receptacles, packages, conveyances, etc.

It is true that in *Ng Hee Weng's* case the question of forfeiture arose consequent upon a conviction. Nonetheless there was clear provisions under section 123 of the Ordinance (section 127 of the Act) to the effect that an order shall be made notwithstanding that no person may have been convicted of an offence, i.e. an offence against the Ordinance or any regulations made thereunder. The fundamental question that calls for determination is whether there is proof to the satisfaction of the court that an offence against the Ordinance (similarly the Act) has been committed and whether the goods are the subject matter of the offence or, if it is a vehicle, whether it is used in the commission of such offence. In our view the distinction that emerges, upon construction of the effects of sections 127(1) and 128(4) of the Act, is essentially in regard to procedure. If there be no prosecution with regard to goods seized under the Act and there is a claim made to any such goods before the expiration of one calendar month from the date of seizure, the court shall, consequent upon the issue of summons requiring the appearance of the person asserting that he is the owner of the goods and the person from whom they were seized, examine the matter and on proof that an offence against the Act has been committed and that either (a) such goods were the subject matter, or, (b) if it was a vehicle, it was used in the commission of such offence before it, make an order for forfeiture.

On an enquiry pursuant to section 128(4) of the Act, the court shall examine all the evidence produced before it including that which may be tendered by the claimant in order to satisfy itself there is such proof. The court is competent in determining the matter before it to draw inferences from the facts proved. Proof on any other elements required to constitute an offence against the Act, such as knowledge or intent, is strictly a matter of inference to be deduced from the facts and circumstances surrounding each particular case where no presumption can properly be invoked.

If the court is satisfied after considering the whole of the materials before it that an offence against the Act has been committed and that the goods were the subject matter or the vehicle was used in the commission of such an offence, then, in that event, and not otherwise, it is mandatory for the court to make an order for forfeiture. It is our considered view that that is indeed the intention of the legislature underlying section 128(4) of the Act. In an appropriate case the court must give effect to the manifest intention of the legislature.

The question of the shifting of the onus of proof does not in the light of what we have stated earlier arise.

Order accordingly.

Solicitors: *Shook Lin & Bok.*

CHIN TECK PLANTATIONS BHD. v. KETUA PENGARAH HASIL DALAM NEGERI

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) May 25, 26 & July 3, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 137 of 1981]

Revenue Law — Income Tax — Land alienated to company for planting oil palms — Timber on land to be extracted — Company assessed with income tax in respect of proceeds of sale of timber logs — Whether sale of timber rights — Adventure in nature of trade — Whether deduction to be made for price of land.

In this case land had been alienated to the appellant for the purpose of planting oil palms and it was a condition that all timber of commercial value on the land should be extracted. The appellant entered into an agreement with another person to cut down and remove the timber. The appellant was assessed to income tax in respect of the proceeds of sale of the timber logs. On appeal the Special Commissioners found that the purpose of the appellant's purchase of land was to sell timber logs and to plant oil palms. Consequently they held that the proceeds of sale of timber were gains derived from an adventure in the nature of trade and thus assessable. On appeal to the High Court counsel for the appellant submitted that the proceeds were capital receipts because the transaction out of which the sum was derived was a mere disposal of part of its capital by the appellant. It was also argued (a) that what was sold was timber rights because extraction of logs was done at the expense of the buyer, the purpose of sale being to prepare land for oil palm planting; (b) that the extraction of timber logs was done in compliance with the conditions of title to the land. It was finally argued that if the proceeds of sale were held to be revenue receipts, the appellant was entitled to deduct from such proceeds the price which it paid for the land.

The High Court held: (1) the Special Commissioners had found as a fact that the purpose of the appellants' acquiring the land was two fold namely to sell timber logs and equally to plant oil palms. It was on this basic finding that they concluded that the sale of the timber logs was a business transaction and as such the appellant was carrying on a concern in the nature of trade. Unless it could be shown that there was no evidence on which the Commissioners could make such finding, the High Court could not interfere;

(2) in this case the agreement with the buyer was for the purchase and sale of severed timber logs and not of timber